APPENDIX A — BUILDING CODE CERTIFICATION DATED SEPTEMBER 27, 1996

FOR IMMEDIATE RELEASE
FRIDAY, SEPTEMBER 27, 1996

CR
(202) 616-2765
TDD (202) 514-1888

TEXAS RECEIVES BUILDING CODE CERTIFICATION

WASHINGTON, D.C. — Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice Department has certified Texas codes as being in compliance with the Americans with Disabilities Act (ADA).

Texas is only the second state in the nation to receive such certification. Washington state codes were certified in March 1995.

"Everyone in the state of Texas – builders, architects, business owners, and the general public – will benefit from Texas' new accessibility standards," said Assistant Attorney General for Civil Rights Deval L. Patrick. *"Certification makes it easier to comply with the law."*

Under the ADA's Standards for Accessible Design, newly constructed or altered public and commercial facilities must be built to be accessible to people with disabilities. States may now apply for certification by the Justice Department if their building codes are equivalent to the federal guidelines. Builders will benefit from this new process because it ensures that construction which meets state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.

APPENDIX B — EXCERPTS FROM DEPARTMENT OF JUSTICE, CERTIFICATION OF STATE AND LOCAL BUILDING CODES

DEPARTMENT OF JUSTICE

CERTIFICATION

OF

STATE AND LOCAL BUILDING CODES

* * *

Why is Certification Important?

A major part of the effort to implement the ADA relies on voluntary compliance by businesses. Code certification facilitates voluntary compliance by putting ADA requirements and local requirements into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

* * *

Appendix B

On Sept 23, 1996, the DOJ certified that the Texas Accessibility Standards meet or exceed the requirements of the ADA Standards for Accessible Design.

* * * *

APPENDIX C — EXCERPTS FROM THE AFFIDAVIT OF LAURA M. FRANZE DATED APRIL 26, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:99-CV-0183-L

CINEMARK USA, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

AFFIDAVIT OF LAURA M. FRANZE

* * *

3. Immediately after Cinemark first received notice that DOJ was conducting an investigation based on (a) complaint(s) about wheelchair seating at three of Cinemark's theaters in Texas (including Tinseltown in El Paso), I, on behalf of Cinemark, requested a meeting with DOJ's designated representative in the investigation, Edward Miller. Mr. Miller represented that he is an attorney with the Disability Rights Section of the Civil Rights Division of the U.S. Department of Justice.

4. After telephone consultation with Mr. Miller, he agreed to a face-to-face meeting at his office in Washington, D.C. at 10:00 a.m. on March 5, 1998.

5. At that meeting, I asked Mr. Miller whether Defendant's blueprint configurations (which had been previously provided to Mr. Miller) showing wheelchair and general seating configuration for theaters in Pflugerville, El Paso (Tinseltown) and Pasadena, Texas, were in compliance with the ADA. Mr. Miller said, "we haven't taken a position on that." I then asked whether the Agency had taken a position on whether there was a minimum viewing angle for wheelchair seating. He said, "no, we have not." I asked whether the Agency was going to take a position on either of these issues. He said, "that's what this investigation was about – we haven't decided." I asked whether the Agency had ever taken a position on placement of wheelchair seating in a stadium theater. Mr. Miller said that DOJ had not taken a position other than 4.33.3. I asked whether there was any requirement that wheelchair seating had to a certain percentage of the way back from the screen." He said there was no official position. I asked whether there was an unofficial position. He said, "no." I asked whether the DOJ had ever taken a position on wheelchair viewing angles in any settlement or other document. He said, "no." I asked whether he could give Cinemark any guidance on the viewing angle requirements for wheelchair seating or seating configuration generally. He referred me to regulation 4.33.3. I asked whether 4.33.3 required a minimum viewing angle and he said that the DOJ had no official position on that. I asked whether Mr. Miller could provide Cinemark with any further clarification as to the DOJ's position on the meaning

of 4.33.3. Mr. Miller said, "no." I explained that Cinemark was still building theaters and Cinemark was interested in a safe harbor – i.e., a position that DOJ felt was clearly permissible under the law even if Mr. Miller could not give me the exact parameters. He said that he could add nothing to the law and the regulations – he repeated that DOJ had taken no position on the location or viewing angle of wheelchair seating within stadium movie theaters other than the law and 4.33.3.

* * * *

APPENDIX D — EXCERPTS FROM BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES DATED JULY 21, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

CIVIL ACTION NO. EP-97-CA-502-H

CHIEF JUDGE HARRY LEE HUDSPETH

JOSÉ G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECH, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, AND MYRA MURILLO,

Plaintiffs

V.

CINEMARK USA, INC.,

Defendant.

BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES

* * *

5. The SMPTE guideline, based on anthropmetric data and numerous studies, establishes that physical discomfort occurs when the vertical viewing angle to the top of the screen

exceeds +35 degrees, while the vertical range of "easy head movement" is +30 degrees. Exhibit 3 at 1-5. Physical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction. Exhibit 3 at 5.

6. The SMPTE Guideline also recognizes that "the normal line of sight to 12 to 15 degrees *below* the horizontal" (or -12 to -15 degrees) (emphasis added). Exhibit 3 at 5. Because of this, the "optimum viewing zone" is from horizontal at eye level (0 degrees) to -30 degrees. Exhibit 3 at 2, fig. 1. The SMPTE Guideline therefore recommends that, to avoid excessive vertical viewing angles and to bring the vertical viewing angle closer to zero degrees, seat backs should be tilted the same amount, 12 to 15 degrees. Exhibit 3 at 5.

* * *

. . . the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public. In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the

general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in the industry guidelines, "viewing angles" refers to vertical viewing angles, horizontal viewing angles and to other components that affect "lines of sight." *See* Exhibit 3 at 1-5.

* * * *

APPENDIX E — EXCERPTS FROM RESPONSE OF *AMICUS CURIAE* UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND SCHEDULING ORDER DATED AUGUST 21, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CIVIL ACTION NO.
EP-97-CA-502-H

CHIEF JUDGE HARRY LEE HUDSPETH

JOSÉ G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECH, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, and MYRA MURILLO,

Plaintiffs

V.

CINEMARK USA, INC.,

Defendant.

RESPONSE OF *AMICUS CURIAE* UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND SCHEDULING ORDER

* * *

Appendix E

Further, as will be explored more fully should the Court permit the filing of the motion to add the United States as a party, Defendant is without any substantive basis for delaying this action. First, the United States is not a necessary party pursuant to Federal Rules of Civil Procedure 19(a)(1) because either party to this litigation may be accorded full relief without the joinder of the United States. The Defendant is free to assert its counterclaim (asserting a violation of the Administrative Procedures Act) in a new action. That counterclaim is not related to any of Plaintiffs' claims or Defendant's defenses, and would require discovery, evaluation of jurisdictional and other motions, and other procedures that could take months or years to resolve. As such, it would delay unnecessarily this action and impose unreasonable burdens of this Court.

* * * *

APPENDIX F — EXCERPTS FROM DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS DATED APRIL 2, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:99-CV-0183-L

CINEMARK USA, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

* * *

Under well-established Supreme Court and appellate precedent, the Department of Justice's actions challenged here — interpreting its regulations in the context of carrying out its enforcement mandate — are not "final agency action" subject to judicial review under the Administrative Procedure Act. Moreover, Cinemark will have a full opportunity to raise its objections to the Department of Justice's actions as defenses in the enforcement suit filed against it. Therefore, the Court does not have jurisdiction to hear this case.

* * * *

APPENDIX G — EXCERPTS FROM TRANSCRIPT DATED SEPTEMBER 17, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NUMBER

3:99-CV-0183-L

September 17, 1999

CINEMARK USA, INC.

Plaintiff,

VERSUS

UNITED STATES DEPARTMENT OF JUSTICE

Defendant.

TRANSCRIPT OF DEFENDANT'S MOTION TO DISMISS BEFORE THE HONORABLE JEFF KAPLAN UNITED STATES MAGISTRATE JUDGE

* * *

[28] . . . The Justice department's position regarding the proper interpretation of Section 4.33.3 was unequivocally stated in its amicus brief filed with the Lara court. The detailed and thoughtful argument contained in that brief suggests that it would be the considered result of deliberation

within the agency, not merely an off-the-cuff remark by a subordinate.

Moreover, the brief bears the name of Bill Lan Lee, the Acting Assistant Attorney General for civil rights and four of his deputies. There is no doubt that the position advocated by the Justice Department was endorsed by the head of the civil rights division.

Finally, the DOJ argues that Cinemark has, quote, "other adequate remedies in court," close quote, because the issue maybe fully litigated in the enforcement action. See 5 USC Section 704.

This misconstrues the statute. The quoted language was intended to prevent district courts from considering cases where special statutory procedures already provide for review on specific agency's actions. See for [29] example Bolen Versus Massachusetts 108 Supreme Court 2722 at 2737, 1988, noting that orders of the Federal Trade Commission and National Labor Relations Boards are subject to direct review in the courts of appeals. It does not divest the district court of otherwise proper jurisdiction under the APA.

For these reasons the court concludes that the Justice Department's interpretation of Section 4.33.3 of the ADA Accessibility guidelines constitutes final agency action that is subject to judicial review under the Administrative Procedures Act. The resolution of this issue pretermits consideration of whether the mandamus act and venue act provide a waiver of sovereign immunity.

* * * *

APPENDIX H — EXCERPTS FROM PETITIONER UNITED STATES' MOTION FOR A PROTECTIVE ORDER DATED APRIL 2, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No.

ORAL HEARING REQUESTED

United States of America,
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
1425 New York Avenue, N.W.
P.O. Box 66738
Washington, D.C. 20035-6738

Petitioner,

V.

Cinemark USA, Inc.,
7502 Greenville Avenue,
Suite 800
Dallas, Texas 75231-3891

Respondent.

EXCERPTS FROM PETITIONER UNITED STATES' MOTION FOR A PROTECTIVE ORDER

* * *

Appendix H

Cinemark seeks discovery from the United States on two areas. First, Cinemark seeks discovery on purely legal issues: the regulatory requirements for wheelchair seating and wheelchair lines of sight under the ADA, the internal diliberative process and discretionary rulemaking functions in the Department's development of the regulations issued under the ADA, and the ADA certification by the Department of Texas state code's accessibility standards. Second, Cinemark seeks discovery on settlements the Department has entered into on these legal issues, seeking privileged information on negotiations and the litigation strategies in this and other cases.

This Court should grant the motion for a protective order and quash the notice of deposition. As shown more fully below, examination of this sort is not allowed, particularly when the government is not a party and the action does not challenge rulemaking. Further, such examination is prohibited, since it delves improperly into the deliberative processes of agency decision makers, and also seeks information from litigators about privileged material.

* * * *

APPENDIX I — EXCERPTS FROM PLAINTIFF UNITED STATES' RESPONSE AND OBJECTIONS TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS DATED MARCH 1, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO.1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

V.

CINEMARK USA, INC.,

Defendant.

PLAINTIFF UNITED STATES' RESPONSE AND OBJECTIONS TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

The United States hereby responds and objects to Defendant Cinemark USA's First Request for Production of Documents and Things.

Appendix I

General Objections

The following General Objections are hereby incorporated into the United States' response to each of the following requests for production.

* * *

The United States also objects to these requests to the extent that they seek documents or information that is protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, the law enforcement investigatory privilege, and any other applicable privilege and/or doctrine. The United States further objects to these requests to the extent that they seek discovery of materials already in Defendant's possession as such discovery is unduly burdensome. Subject to and without waiving any objections or privileges, the United States will produce all responsive and discoverable material related to wheelchair seating in stadium style movie theaters.

* * *

Request for Production No. 9:

All documents and other tangible things referring or relating to any DOJ interpretation(s) of JDSAD, Section 4.33.3 in the context of movie theaters, movie auditoriums, or movie complexes.

Response:

The United States objects to this request on the grounds that it seeks discovery related to defendant's counterclaim alleging violation of the APA, pending a ruling by the Court on the United States' Motion to Dismiss Defendant's Counterclaims and Defendant's Motion for Partial Summary Judgment on the counterclaim, and seeks discovery that is not legally permissible in APA-based actions. The United States further objects to this request on the grounds that it seeks disclosure of documents that are protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, and the law enforcement investigatory privilege. The United States additionally objects to this request on the grounds that it seeks disclosure of documents that are not relevant or likely to lead to the discoverability of admissible evidence and is overbroad. See also response and objections to Request for Production No. 8, incorporated herein. Subject to and without waiving any objections or privileges, the Department responds that all other relevant, nonprivileged documents responsive to this request are produced under Request for Production No. 8.

* * * *

APPENDIX J — EXCERPTS FROM MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF UNITED STATES' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT DATED JANUARY 17, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO.1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

v.

CINEMARK USA, INC.,

Defendant.

EXCERPTS FROM MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF UNITED STATES' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

* * *

In designing and constructing movie theaters, experts such as engineers and architects consider such factors as vertical and horizontal viewing angles, distance from the screen, obstruction, and distortion. U.S. Facts at 27-32. However, the Standards do *not* establish specific minimum

or maximum viewing angles, distance to the screen, obstruction of view, or distortion of images that a movie theater is legally permitted to provide for wheelchair spaces. Instead, the regulation requires that the line of sight be comparable; that necessarily requires that viewing angles, distance to the screen, obstruction of view and distortion of images also be comparable between patrons who use wheelchairs and most members of the general public. For example, although various industry design standards provide that no seat should have a viewing angle to the top of the screen exceeding 30-35 degrees because of discomfort, *see, e.g.*, SMPTE Engineering Guideline, Design of Effective Cine Theaters (1994), at 5, 7, App. at 18, the Department does *not* adopt that 30-35 degree measurement as a maximum for wheelchair spaces. Under Standard 4.33.3, the only applicable requirement for lines of sight for wheelchair spaces is comparability. . . .

* * * *

APPENDIX K — EXCERPTED PLAINTIFF UNITED STATES' AMENDED BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 16, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. 1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff,

V.

CINEMARK USA, INC.,

Defendant.

PLAINTIFF UNITED STATES' AMENDED BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

Regardless, as a factual matter, the *Lara* brief is not inconsistent with prior interpretations of Standard 4.33.3. First of all, there are no such prior interpretations in the context of stadium-style theaters. As Cinemark itself acknowledges, prior to 1998 the Department of Justice had

never interpreted Standard 4.33.3 in the context of stadium-style theaters. *See* Cinemark Exh. L ¶ 5. The "historical pronouncements" on which Cinemark places such importance date to an era when stadium-style theaters did not even exist. *See* Cinemark Br. at 7. But as agencies can apply existing regulations to new facts without engaging in rulemaking at all, *see, e.g., Guernsey Mem. Hosp.*, 514 U.S. at 96, they cannot be bound by interpretations that may have been developed before those facts even existed. Similarly, the primary "pronouncement" on which Cinemark relies — an alleged oral statement from April 1991 — *pre-dates* the promulgation of Standard 4.33.3. *See* Cinemark Br. at 7, 18. Obviously, even if this reported oral statement were otherwise worthy of credence, the Department of Justice cannot be bound by alleged interpretations that pre-date the authority being interpreted.

* * * *

APPENDIX L — BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF ARCHITECTS IN SUPPORT OF CINEMARK USA, INC. AND SEEKING REVERSAL DATED JUNE 3, 1999

NO. 99-50204

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

JOSE G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECK, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, MYRA MURILLO, MARGARITA LIGHTBOURNE-HARBECK,
Plaintiffs-Appellees,

v.

CINEMARK, USA, INC.,
Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
El Paso Division
Civil Action No. EP-97-CA-502-H
Honorable Harry Lee Hudspeth,
United States Chief District Judge

BRIEF OF AMICUS CURIAE
AMERICAN INSTITUTE OF ARCHITECTS

In Support of Cinemark USA, Inc.
and Seeking Reversal

Appendix L

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ATTORNEYS FOR AMICUS CURIAE
AMERICAN INSTITUTE FOR ARCHITECTS

Appendix L

INTEREST OF AMICUS

The American Institute of Architects ("AIA"), headquartered in Washington, D.C., is a national organization representing 63,000 architects across the country. AIA members comprise a broad cross-section of architects responsible for the design and construction of many types of structures that require compliance with the ADA.

The AIA supports the purposes of the ADA statute for Americans with disabilities and expanding the opportunities for fulfillment for persons with disabilities has long been a part of AIA's public policy. AIA seeks leave in this appeal to apprise this Court of one aspect of the District Court's opinion which adversely affects architects. The District Court read the certification of codes process provided by the ADA out of the statute. That process, established by Congress, provides a means by which federal, state and local governments can work together to ensure that architects, builders and building owners can determine, from the beginning, how to comply with ADA requirements. In order to obtain compliance with the ADA, its statutory requirements must be understandable and achievable. Thus, the certification process provides a smooth and workable method to assure that the buildings that are constructed are accessible, avoiding the inefficiencies and delays imposed by litigation and retrofitting. With the evolving nature of the ADA, the certification process is currently the only means available for architects to ensure that they are acting in accordance with ADA requirements, thereby providing a safe harbor from liability. Without that process, architects will be frustrated in their ability to develop building designs that comply with the ADA and achieve Congress' goals with respect to accessibility.

Appendix L

INTRODUCTION

Architects have no stake in which specific requirements are imposed by the ADA. An architect does not have an interest in whether the ADA requires one wheelchair accessible seat or one hundred wheelchair accessible seats in a facility.[1] Architects can develop their designs to comply with ADA requirements. However, architects can only do so if they can determine with certainty what requirements the ADA imposes for the facilities they are designing.

State and local governments have long used a very workable method for obtaining compliance with their building and fire codes. Prior to obtaining permits for construction, the architect provides the code official with the plans and specifications for the project to allow the official to determine whether the proposed project complies with all applicable rules and regulations. When an aspect of the design is found not to comply with the requirements, the architect can alter the plans and specifications to address the noncompliance.

Similarly, during the construction phase of the project, code officials inspect the facility to determine compliance requirements. This allows the official to physically see the project and analyze the facility relative to building accessibility requirements. Most importantly, the official can meet with the architect to address any problems or questions,

1. The focus of the AIA is not how Texas Accessibility Standards section 4.33.3 is interpreted in the context of stadium style theaters. It is only important that architects know what the proper interpretation is in order to design facilities in compliance with section 4.33.3.

and can make compliance decisions based upon a personal review of the actual facility.

The federal government does not have these types of mechanisms in place. The Department of Justice ("DOJ"), the agency charged with enforcing the ADA, does not have a system in place whereby architects may consult with DOJ regarding issues specific to a single project. DOJ's informal technical assistance line fields calls regarding ADA issues, but its advice is general and not legally binding on the agency. Thus, architects, even if they submit plans and specifications to DOJ, cannot obtain a finding that they meet the relevant ADA requirements, or do not meet requirements in identified ways. DOJ does not undertake inspections during the construction process to ensure that the facility is being constructed pursuant to all applicable ADA requirements. Rather, the only time DOJ evaluates a facility to determine ADA compliance is after a complaint has been filed, or an investigation has been undertaken. By that time, the facility may be finished or at least too far along to prevent wasteful construction and reconstruction, and may result in compromises that provide less perfect access than would have been possible if determined at an earlier stage.

The drafters of the ADA had the foresight to provide a means by which architects and builders who design could ensure that their designs complied with ADA regulations, by relying on the estimated 40,000 state and local building code enforcement systems. The certification provision, 42 U.S.C. § 12188(b)(1)(A)(ii), establishes that state and local entities may obtain certification from the Attorney General that their building codes meet or exceed the requirements of the ADA.

Architects may, therefore, receive guidance as to the appropriate choices for a certain facility, both before and during construction. When certification has been granted by the Attorney General, a facility found to be in compliance with the certified local or state accessibility standards is necessarily in compliance with the corresponding ADA requirements.[2] Architects whose plans and specifications have been approved under the certified building code should thus be assured that they will not later be found liable for failing to design a facility that is ADA compliant.

Here, the Texas Accessibility Standards ("TAS") were granted certification by the Attorney General in 1996, and Cinemark had been found to comply with that code. Both state and local officials had determined that the Tinseltown facility complied with TAS, and thus necessarily the ADA.[3] Nonetheless, the District Court found Cinemark not in compliance with the ADA. In doing so, the District Court eviscerated the certification provision. If the District Court's decision is affirmed, architects, builders and building owners are left in the position of having no degree of certainty, and Congress' certification provision is rendered meaningless.

---

2. It is important to note that certification is not effective "if an official either waives an accessible element or feature or allows a change that does not provide equivalent facilitation." 28 C.F.R. pt. 36, app. B. Thus, any concern that a local code official may simply waive an applicable requirement has already been addressed. No such issue was raised by plaintiffs below.

3. It was undisputed that the requirements of section 4.33.3 of TAS are more stringent than the requirements found in section 4.33.3 of the ADAAG. *Compare* TAS § 4.33.3 *with* ADAAG § 4.33.3.

AIA therefore requests that this Court give effect to the certification process of the ADA, and reverse the judgment entered against Cinemark by the District Court.

ARGUMENT

I. The Enactment Of The ADA And The Certification Process.

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(l). In drafting Title III regarding the construction and operation of public accommodations, however, Congress intentionally "painted with a broad brush" and then required the Attorney General to promulgate regulations to implement the ADA. *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 707 (D. Or. 1997). The Attorney General was directed to issue regulations consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. 42 U.S.C. § 12186(c).

Although ADAAG was created in 1991 as mandated by Congress, it was recognized at the inception of the ADA that the most effective enforcement of the ADA would be through compliance by builders and architects from the design phase forward. It was further recognized that compliance would best be achieved by encouraging states to adopt building codes which contained requirements at least as stringent as the ADA requirements. Where a state adopted a building code which set forth requirements equivalent to the ADA and this

is certified by DOJ, architects could then be assured of compliance with the ADA by complying with the certified code.

To achieve this result, a certification procedure was enacted which encouraged states and local entities to seek certification of their building codes by the Attorney General. Under the certification process, a building code will be certified where the "code meets or exceeds the minimum requirements of the [ADA] for the accessibility and usability of places of public accommodation and commercial facilities." 28 C.F.R. § 36.602. To guarantee the integrity of certification, a stringent process was put in place which includes the submission of a formal application seeking certification, as well as public hearings both at the state or local level, and in Washington, D.C. 28 C.F.R. § 36.603. Moreover, because the certification process was intended to be a substantive review of the state or local building code, the statute is designed to provide certain protections when the Attorney General has granted certification at the conclusion of the process finding that a state or local building code meets or exceeds the minimum requirements of the ADA:

> a[t] any enforcement proceeding under title III of the Act, such certification shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of title III.

28 C.F.R. § 36.602.

Appendix L

II. DOJ Has Recognized The Importance Of The Certification Process.

In identifying the purpose of the certification process DOJ has stated:

> It allows builders to rely on their local inspection processes . . . . It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

(R. 319). Moreover, Bill Lann Lee, Acting Assistant Attorney General of the Civil Rights Division, recently testified before the Subcommittee on the Constitution that he is a "big fan" of code certification because knowing and following the standards up front allows people to comply with the ADA. (*See* Exhibit A, p. 3).

Knowing from the beginning of a project how the standards apply is crucial for architects. Because of the intentionally broad language of the ADA and its implementing regulations, the application to a specific facility

is often difficult to determine.[4] The certification process provides a means for architects to determine in advance whether they are in compliance. As DOJ proclaimed in 1996 when Texas became only the second state to receive certification, "Everyone in the state of Texas — builders, *architects*, business owners, and the general public — will benefit from Texas' new accessibility standards . . . Certification makes it easier to comply with the law." (R. 320) (emphasis added).

In addition, the certification process was intended to reduce the need for ADA litigation involving builders and architects. By allowing local code inspectors to determine compliance issues early in the process, changes necessary to fully comply with the ADA requirements can be made more easily, and less expensively. (*See* DOJ press release of December 12, 1997, attached hereto as Exhibit B). Architects were informed that they would be entitled to "additional legal protection if they built in compliance with the certified code, but are later sued under the ADA." (*See* DOJ press release of May 27, 1998, attached hereto as Exhibit C). Thus, DOJ's position was that approval by Texas' state and local code officials would constitute a strong defense for architects if there were later complaints of discrimination. Certification,

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4. This case provides the perfect example. Although AIA takes no position as to the proper interpretation of section 4.33.3 here, it is important to note that DOJ never provided an interpretation of section 4.33.3 of the ADAAG in the context of stadium style theaters until this litigation was filed by plaintiffs. Cinemark therefore relied upon the interpretation of the state and local code officials who determined that Tinseltown complied with section 4.33.3 of TAS. (R. 456, 516, 1723).

therefore, was intended as a safe harbor for architects who attempted to comply with the requirements of the ADA by working with local code officials.

III. The Decision Below Eviscerates The Purpose And Consequences Of The Certification Process.

In complete disregard for the certification process provided by Congress and the goals of DOJ to provide architects with a safe harbor, the District Court disregarded the certification of TAS by the Attorney General and the determinations by state and local code inspectors that Cinemark complied with TAS. Plaintiffs had argued these were of absolutely no relevance. Further, plaintiffs did not dispute the evidence establishing that Tinseltown was found to be in compliance with all TAS requirements.

That evidence showed that prior to the construction of the facility, the plans and specifications for the Tinseltown complex were reviewed by Harry Manley, a plan reviewer for the City of El Paso. Manley had attended the Texas "Accessibility Academy" training course and passed the required examination with a score of 80 or better. (R. 321). Upon his review of the plans and specifications, Manley granted conditional approval for the project subject to certain revisions not applicable here. Notably, as to TAS section 4.33.3, Manley found that the plans and specifications submitted by Cinemark were in compliance with the requirements at issue in this case. (R. 516). In accordance with El Paso's duties as a Municipal Service Provider, Manley also submitted his conditional approval to the Texas Department of Licensing and Regulation. (R. 322). Manley

testified unequivocally that based on his experience and training, it was his opinion that the plans for Tinseltown complied with TAS section 4.33.3. (R. 506).

Furthermore, James Sheffield, a professional engineer and Independent Contract Provider for the State of Texas, conducted a full inspection of the facility during the construction process. (R. 322). Upon the completion of his inspection, Sheffield prepared a letter to Mr. Don Harton of Cinemark including a copy of his report. (R. 449-459). The report detailed the findings of the inspection, including the facility's compliance, or lack thereof, with various TAS requirements. Like Manley, Sheffield determined that the placement of wheelchair locations at Tinseltown complied with section 4.33.3. (R. 456). Sheffield also conducted a second inspection and again found that Tinseltown complied with section 4.33.3. (R. 1723). Thus, both before and during the construction process, Cinemark was specifically informed that its facility was in compliance with TAS section 4.33.3, and therefore necessarily met or exceeded the requirements of the ADA at issue in this case.[5]

Disregarding DOJ's expressed views that the certification process was intended to limit litigation, plaintiffs contended that the proper procedure for addressing these issues was

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5. The record also establishes that Cinemark worked with other code officials to ensure that Tinseltown complied with TAS and the ADA. Terry Lee Williams, the deputy Director for Building Services for El Paso, testified that he met with representatives from Cinemark on at least four occasions to discuss compliance issues. (R. 465). As with Manley and Sheffield, Williams was also of the opinion that Tinseltown complied with TAS section 4.33.3. (R. 472).

through a suit by Cinemark against the city and state. Specifically, plaintiffs stated:

> If the City and/or the State had some obligation to help Defendant meet its duty to comply, and either of [sic] both of those entities failed to meet their obligation, Defendant can bring a separate action against those entities, or could have cross claimed against them in this case.

(R. 801). Plaintiffs thus actually advocated additional litigation, as opposed to advancing one of the goals of certification: reducing litigation through compliance by architects and owners/developers. Clearly, however, litigation against code officials is not a purpose Congress sought to further through the certification process.

Even though the record contained unrefuted evidence that TAS had been certified as meeting or exceeding the ADA requirements, and that Tinseltown had been found to be in compliance with TAS, the District Court granted summary judgment in favor of plaintiffs without even addressing the effect of the Attorney General's certification of TAS, (R. 1259-63), although under the plain language of the ADA, the certification of TAS constituted *rebuttable evidence* that Cinemark complied with the ADA requirements. 28 C.F.R. § 36.602.

By ignoring the presumption granted to an architect who complied with a certified code, and granting judgment for plaintiffs, the District Court necessarily determined that government-determined compliance with the certified

building code was irrelevant. That decision is inconsistent with the terms and intent of the ADA. It effectively nullifies the certification process and undermines Congress' plan to encourage voluntary compliance with the ADA. In fact, the District Court's decision ensures voluminous litigation against architects, even when local code officials inform the architect that the facility complies with a certified statute.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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